

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 12, 2017

v

JORDAN SHANE PHILLIPS,

Defendant-Appellant.

No. 334852
Kalamazoo Circuit Court
LC No. 2016-000452-FC

Before: MARKEY, P.J., and HOEKSTRA and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by right his bench-trial conviction of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(2)(b). The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to a mandatory 25 to 50 years' imprisonment with a sentence credit of 180 days. We affirm.

This case arises from a sexual assault that occurred in Kalamazoo, Michigan. On February 18, 2016, between the hours of 7:00 p.m. and 10:00 p.m., the victim's mother asked her next-door neighbor, defendant's girlfriend, to babysit her three children while she left to run an errand with her boyfriend. Defendant's girlfriend was already watching her own children at home, so defendant said he would watch the victim and her siblings. The victim's mother handed defendant her keys, watched him enter her apartment, and then left the building. Approximately one hour later, the victim's mother returned home; however, defendant was not inside her apartment. The victim's mother went next door and picked up her key. She did not talk to defendant.

The next day, the six-year-old victim asked her mother if defendant had watched her the night before. The victim told her mother that defendant came into her bedroom, woke her up, and touched her in her "private area." The victim stated that, while she was in bed sleeping, defendant touched her on her private part that was used to pee. This action caused her to immediately wake up, see defendant's shadow, and "holler." The victim testified that she "was yelling [quiet] a little bit," but her two brothers sleeping in the other room did not come in. Furthermore, the victim testified that defendant touched her under her clothing and over her underwear and that it burned when his finger moved back and forth. Subsequently, the victim's mother went to speak with defendant's girlfriend about the incident; however, defendant's

girlfriend did not believe her. The victim's mother called the police, and the victim was taken to the hospital to be examined.

A registered nurse conducted the victim's examination at the hospital. The registered nurse testified that the victim told her that defendant touched her in her groin or crotch area. During her examination of the victim, the registered nurse found and saw an area of redness on the inner aspect of the victim's labia on the left side toward the vaginal vault inside the vaginal opening, but outside the vagina. The redness was consistent with digital finger penetration and rubbing; however, the registered nurse could not definitively state the cause of the redness as it could have been from underwear riding on something, a hand, a finger, or a foreign object. The registered nurse further testified that a patient with redness caused from a digit rubbing that area might experience a burning feeling when that rubbing occurred. Additionally, the registered nurse stated that pictures were taken, but defense counsel never admitted them.

Defendant's girlfriend testified for the defense and stated that she had children with defendant. She also said that defendant lived with her at the time of the incident. Defendant's girlfriend further stated that defendant never went inside the victim's apartment and that he was with her the entire night. But defendant's girlfriend later changed her story and stated that while she was in the hallway on the phone, defendant came out, poked his head in on the children, then shut the door, and walked back to their apartment. Defendant's girlfriend again reiterated that defendant never entered into the victim's apartment except to peek inside the one time to check on the children. While defendant was not in her line of sight the entire time, defendant's girlfriend testified that defendant could not have left the apartment without her knowing it.

Defendant testified that during his interview with an officer, he failed to disclose that he lived at his girlfriend's apartment because he did not want child protective services to take his children away. Defendant further admitted to lying to the police again when he said that he had never watched the victim before, that he had never been over to his girlfriend's apartment, and that he never went into the victim's apartment even though his girlfriend claimed he did. In fact, defendant claimed that his girlfriend was lying at one point. Furthermore, defendant testified that he only opened the door to the victim's apartment, poked his head in between 12:30 a.m. and 1:00 a.m. and did not enter the children's rooms. He also denied touching the victim.

The trial court concluded that defendant was guilty beyond a reasonable doubt of CSC-I and stated the following:

I found the testimony of [the victim] to be most compelling and the corroboration of the description by the SANE nurse of the injury helped the Court to determine that the Defendant is guilty of criminal sexual conduct in the first degree and the Prosecutor has proven each of the elements necessary beyond a reasonable doubt.

The trial court further held that,

The girl although young understood what it means to tell the truth and to tell a lie. Applying the jury instruction regarding witness credibility to [the victim] was very clear to the Court, I think anybody watching that she was trying hard to tell the truth, she was not trying to please anybody. She was relating an

incident that occurred to her. What she said made sense factually to the Court. She didn't embellish. I just believed her. I watched her mannerisms while testifying and again I found her testimony to be very compelling and then when I listen to the testimony of the SANE nurse and . . . when she described the redness and how it would be consistent with a touching or scratching that only strengthened my belief that the victim was telling the truth.

Additionally, the trial court ruled that it did not believe defendant and did not believe a majority of what the defendant's girlfriend said. Defendant now appeals his conviction.

First, defendant argues that his conviction is against the great weight of the evidence.

This Court reviews a great-weight claim to determine "whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Generally, conflicts in testimony or the credibility of witnesses will not be sufficient grounds to grant a new trial. *People v Morris*, 314 Mich App 399, 414; 886 NW2d 910 (2016). Even if this Court disagrees with the verdict, it should only disturb the lower court's findings if there is "a real concern that an innocent person may have been convicted or that it would be a manifest injustice to allow the guilty verdict to stand." *People v Lemmon*, 456 Mich 625, 644; 576 NW2d 129 (1998) (quotation marks and citation omitted).

In this case, the six-year-old victim testified that defendant touched her on her private part that she used for peeing, underneath her clothing, while she was asleep in her bed. She also testified that defendant moved his finger inside her causing it to burn. While the light in the victim's room was turned off, the victim testified that her bedroom door was open with a light on the hallway. Although the crucial testimony against defendant came from the victim, this Court has previously decided that a victim's testimony alone is sufficient to uphold a CSC conviction against a challenge to the weight of the evidence. *Musser*, 259 Mich App at 219. Furthermore, our Legislature has established that "[t]he testimony of a [CSC] victim need not be corroborated in prosecutions under sections [MCL 750.]520b to [MCL 750.]520g." MCL 750.520h. But in this case, there was corroborating evidence, including the testimony of the sexual assault nurse in stating that she found an "area of redness on the inner aspect of [the victim's] labia on the left side." The nurse testified that this redness was consistent with digital penetration.

Additionally, defendant argues that the trial court failed to take into account defendant's girlfriend's and defendant's testimonies that defendant never went into the victim's apartment. This Court will not second-guess the trial court's determinations as to the credibility of the witnesses. See *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). In addition, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). In this case, the trial court had this to say about defendant's and defendant's girlfriend's testimonies:

Applying the same credibility standards to [defendant's girlfriend] and to the Defendant and motivation to not tell the truth at the beginning of the case is the same motivation to not tell the truth in Court. I did not believe [defendant]. I

did not believe the majority of the things that were testified to by [defendant's girlfriend].

On the other hand, the trial court found the victim's testimony "very compelling." Because the evidence supports the verdict so that a rational trier of fact could find defendant guilty beyond a reasonable doubt, it cannot be said that "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." See *Musser*, 259 Mich App at 218-219.

Second, defendant's argument that the evidence was insufficient to support a guilty verdict is without merit.

The de novo standard of review is proper in reviewing challenges to the sufficiency of evidence, "viewing the evidence in the light most favorable to the prosecution . . ." *People v Bennett*, 290 Mich App 465, 471; 802 NW2d 627 (2010). The findings of a trial court are reviewed for clear error. MCR 2.613(C). "In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Id.*

In this case, there was ample evidence for the trial court to convict defendant of CSC-I. It is undisputed that the victim was under the age of 13 and that defendant was over the age of 17. Defendant therefore argues that there was insufficient evidence to prove that sexual penetration occurred; however, evidence of sexual penetration was established by the victim's testimony. As stated earlier, the testimony of a victim alone, without corroborating evidence, can constitute sufficient evidence to establish defendant's guilt under MCL 750.520b. Although a victim's testimony does not need to be corroborated, MCL 750.520h, the prosecution offered evidence from other witnesses to support the victim's testimony. First, the victim's mother testified that the victim told her that defendant "touched her." Second, the sexual assault nurse testified that she performed an examination on the victim, and the victim told her that defendant had touched her genitals. She further testified that she noticed redness on the inside of the labia going towards the vaginal vault that was consistent with digital penetration. This redness, if triggered by a digit rubbing that area, would cause a patient to experience burning at the time, which is exactly what the victim testified to during trial. Viewed in the light most favorable to the prosecution, sufficient evidence supported defendant's conviction of CSC-I.

Third, defendant's argument that a new trial is warranted because defense counsel was ineffective for failing to admit the photographs taken by the sexual assault nurse is without merit.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d (2002). Any factual findings are reviewed for clear error, and the ultimate constitutional issue is reviewed de novo. *Id.* In this case, because defendant's motion for remand was denied and no evidentiary hearing was held, our review is limited to mistakes apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). "To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the fact-finder would not have convicted the defendant." *Musser*, 259 Mich App at 221.

Defendant argues that defense counsel was ineffective for not admitting into evidence photographs taken during the sexual assault nurse's examination to show whether the victim was actually injured in the vaginal area. Defendant also asserts that defense counsel did not ask to see the photographs. But defendant only supports this claim with his own affidavit that simply states that his attorney did not admit the photographs that could have allegedly exonerated him. Furthermore, defendant offers no proof to show that defense counsel did not review the photographs in discovery. Additionally, defense counsel may have purposefully chosen not to admit the photographs to avoid contesting the young victim's injuries. Instead, the attorney may have wanted to highlight the fact that there were other potential reasons for the redness. For example, the sexual assault nurse testified that the redness could have been caused by underwear or some other innocent reason. The nurse acknowledged that she did not know definitively the origin of the redness. Therefore, it is reasonable to assume that defense counsel wanted to focus on the cause of the injury and not whether the child was actually injured. This Court must " 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " *LeBlanc*, 465 Mich at 578 (citation omitted). The fact that the strategy chosen did not work does not constitute deficient performance. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

Furthermore, defendant has failed to prove that admitting the photographs would have changed the result of this trial. In fact, the photographs themselves likely corroborate the testimony of the victim by showing that her injuries were consistent with digital penetration as testified by the sexual assault nurse. The testimony of a victim alone, without corroborating evidence, can constitute sufficient evidence to establish a defendant's guilt under MCL 750.520b. With such compelling evidence present in this case, defendant has not established a reasonable likelihood that the outcome of the trial would have been different but for the alleged deficiency. *Musser*, 259 Mich App at 221.

Finally, we find without merit defendant's argument that a new trial is warranted because defense counsel coerced defendant to waive his right to a jury trial.

"The trial court's determination that a defendant validly waived his right to a jury trial is reviewed for clear error." *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). A finding is clearly erroneous where, after reviewing the entire record, we are "left with a definite and firm conviction that a mistake has been made." *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998).

Defendant has failed to point to anything in the record that would support his claim that he was coerced into waiving his right to a jury trial. Instead, the evidence is to the contrary, as defendant waived his right to a jury trial on the record in open court at the settlement conference on July 25, 2016. A defendant's waiver of his constitutional right to trial by jury must be voluntarily and knowingly made. *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998); *People v Reddick*, 187 Mich App 547, 549; 468 NW2d 278 (1991). MCR 6.402(B) states the proper procedures for securing a jury trial waiver are as follows:

Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and

that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

In this case, the trial court followed the appropriate procedure. First, defendant was informed of his rights and then asked if he had been promised or threatened in any way. Next, when questioned if waiving the jury trial was his choice, defendant responded, “Yes, your Honor.” Thus, defendant’s coercion claim is contrary to the record made in open court. Although defendant submitted an affidavit stating that he was forced and coerced into making his decision, “a party or witness may not create a factual dispute by submitting an affidavit that contradicts his or her own sworn testimony or prior conduct.” *People v Armisted*, 295 Mich App 32, 49; 811 NW2d 47 (2011). Because defendant, under oath, freely, voluntarily, and knowingly waived his right to a jury trial, defendant has failed to demonstrate that his trial counsel coerced him to waive his right to a jury trial.

In sum, there was sufficient evidence to convict defendant of CSC-I, and defendant’s conviction was not against the great weight of the evidence. Furthermore, defendant is not entitled to a new trial because defendant’s trial attorney was not ineffective by failing to request to admit the photos taken by the sexual assault nurse. Finally, defendant has failed to establish that his waiver to a jury trial was forced and coerced by this trial attorney.

We affirm.

/s/ Jane E. Markey
/s/ Joel P. Hoekstra
/s/ Amy Ronayne Krause